

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **10-06335-jw**

Adversary Proceeding Number: **12-80208-jw**

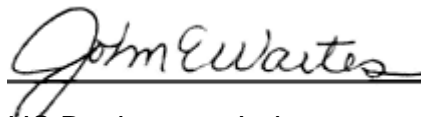
**ORDER DENYING TRUSTEE'S MOTION TO STRIKE MARILYN GARTLEY AS A "MAY
CALL" WITNESS WITHOUT PREJUDICE**

The relief set forth on the following pages, for a total of 4 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
02/09/2018**



Entered: 02/09/2018



US Bankruptcy Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

<p>In re</p> <p>Infinity Business Group, Inc.,</p> <p style="text-align: right;">Debtor.</p>	<p>C/A No. 10-06335-JW</p> <p>Adv. Pro. No. 12-80208-JW</p> <p style="text-align: center;">Chapter 7</p>
<p>Robert F Anderson, as Chapter 7 Trustee,</p> <p style="text-align: right;">Plaintiff,</p> <p>v.</p> <p>Keith E. Meyers, Cordell L.L.C, The Cordell Group L.L.C, Gibson Commons L.L.C, Bryon K Sturgill, John F Blevins, Golden Ghost, Inc., Haines H. Hargrett, Donald Brent Grafton, D. Larry Grafton, Grafton and Company, P.L.L.C., Morgan Keegan & Company, Inc., Law Offices of John F. Blevins, LLC, O. Bradshaw Cordell, Wade Cordell, Sturgill & Associates Inc., Morgan Keegan & Associates, LLC,</p> <p style="text-align: right;">Defendants.</p>	

ORDER DENYING TRUSTEE’S MOTION TO STRIKE
MARILYN GARTLEY AS A “MAY CALL” WITNESS WITHOUT PREJUDICE

This matter comes before the Court on the Motion of plaintiff Robert F. Anderson, as Chapter 7 Trustee (“Trustee”) to strike Marilyn Gartley (“Ms. Gartley”) from the “may call” witness list (“Motion”) submitted by defendants’ Morgan Keegan & Company, Inc. and Keith E. Myers (collectively “MK Defendants”). MK Defendants filed a timely objection to the Motion.

MK Defendants identified Ms. Gartley, one of the Trustee’s legal counsel in this proceeding, in their pre-trial submissions as a “may call” witness (*i.e.* a witness who, if needed, MK Defendants reserved the right to call). Trustee objected to Ms. Gartley’s identification as a

witness on the grounds that her testimony would not be relevant under Federal Rule of Evidence 401. Trustee also argued that if Ms. Gartley were to testify, privileged information might be disclosed.

In their objection to the Motion, MK Defendants clarified that by identifying Ms. Gartley in their witness list, their intent was not to disqualify her as Trustee's trial counsel. Instead, MK Defendants stated their goal was to preserve their ability to call Ms. Gartley, if needed, to testify with respect to three specific matters:

- (1) information provided by the Trustee to his expert witness, George Durant, that the expert relied upon in formulating opinions regarding damages;
- (2) documents MK Defendants obtained from unidentified third parties outside of the discovery process, which the third parties obtained from the Trustee;¹ and
- (3) non-privileged information regarding the facts and circumstances of the Trustee's settlement with John Blevins ("Blevins").

Pursuant to the Court's Orders setting deadlines for the preparation and filing of the Joint Pretrial Order, the parties were required to identify witnesses who would be called for trial. Once entered, the Joint Pretrial Order is intended to control the course of the proceeding and, unless a party can demonstrate manifest injustice or a need to rebut the opposing party's evidence, a witness not previously identified will not be permitted to testify. Therefore, to avoid possible future prejudice, it appears that counsel for MK Defendants elected to err on the side of identifying all possible witnesses.

The Court understands the Trustee's concerns. However, at this stage of the proceeding, which will culminate in a multi-week bench trial, the Court is reluctant to preemptively exclude evidence in advance of the parties' presentations at trial. *See generally* Charles Alan Wright and

¹ It appears this item relates to the admissibility of certain documents which are being addressed in the Pre-Trial Motion Seeking Determination as to Privileged Status of Proposed Exhibits filed by MK Defendants on October 30, 2017 and may be concluded by a ruling on that Motion.

Arthur R. Miller, *Federal Practice and Procedure*, § 2885 (3d April 2017) (discussing the admission or exclusion of evidence in non-jury matters). Inasmuch as Ms. Gartley is only identified as a “may call” witness, if the issue presents itself at trial, the Court can make a final ruling at that time.

Although denying the Trustee’s motion, absent both compelling circumstances and a showing by MK Defendants that there is no other available source of information,² it is the opinion of the Court that the best sources of testimony regarding both the information and documents provided by the Trustee to either his expert witnesses and third parties, and information regarding the facts and circumstances of Trustee’s settlement with Blevins are the Trustee, the experts, third parties, and Blevins as opposed to Trustee’s counsel. The use of witnesses at trial other than Trustee’s counsel would be far less of a distraction to the proceeding and avoid issues of privilege and other attorney-client disclosures. In the event of calling Ms. Gartley as a witness and upon an objection by the Trustee at trial, MK Defendants’ will be required to demonstrate that need in light of this notice to use alternative testimony.

CONCLUSION

For these reasons, the Court denies the Trustee’s motion, without prejudice.

AND IT IS SO ORDERED.

² And subject to objection by the Trustee.